

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

JAMES P. SMITH,)	
)	
Petitioner/Defendant,)	
)	CIVIL NO. 07-cv-114-DRH
vs.)	
)	CRIMINAL NO. 05-cr-30057
UNITED STATES of AMERICA ,)	
)	
Respondent/Plaintiff.)	

MEMORANDUM AND ORDER

HERNDON, District Judge:

This matter is before the Court on Petitioner's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence. This motion was filed by Petitioner, *pro se*, and the Government has not filed written responses to this motion. For the reasons set forth below, the motion is denied.

Pursuant to a plea agreement and stipulations of fact, Petitioner pleaded guilty to possession with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). On February 3, 2006, Petitioner was sentenced to 51 months imprisonment, three years supervised release, a fine of \$500, and a special assessment of \$100. No appeal was filed. On February 12, 2007, Petitioner filed this motion pursuant to section 2255.

Petitioner entered into a plea agreement with the Government in an attempt to benefit himself. In exchange for the benefits he received, Petitioner waived his right to a direct appeal and to a collateral attack under section 2255. Specifically, the plea agreement provides in relevant part:

1. The Defendant understands that by pleading guilty, he is waiving all appellate issues that might have been available if he had exercised his right to trial. The Defendant states that he is fully satisfied with the representation he has received from his counsel, that they have discussed the Government's case,

possible defenses and have explored all areas which the Defendant has requested relative to the Government's case and his defense.

2. The Defendant is aware that Title 18, Title 28 and other provisions of the United States Code afford every defendant limited rights to contest a conviction and/or sentence. Acknowledging all this, and in exchange for the recommendations and concessions made by the United States in this plea agreement, the Defendant knowingly and voluntarily waives his right to contest any aspect of his conviction and sentence that could be contested under Title 18 or Title 28, or under any other provision of federal law, except that if the sentence imposed is in excess of the Sentencing Guidelines as determined by the Court, the Defendant reserves the right to appeal the reasonableness of the sentence. The Defendant acknowledges that in the event such an appeal is taken, the Government reserves the right to fully and completely defend the sentence imposed, including any and all factual and legal findings supporting the sentence, even if the sentence imposed is more severe than that recommended by the Government. Defendant knowingly and voluntarily waives his right to seek a pardon, whether before or after his release from custody.
3. Defendant's waiver of his right to appeal of bring collateral challenges shall not apply to: 1) any subsequent change in the interpretation of the law by the United States Supreme Court or the United States Court of Appeals for the Seventh Circuit, which is declared retroactive by those Courts, and which renders the defendant actually innocent of the charges covered herein, and 2) appeals based upon Sentencing Guideline amendments which are made retroactive by the United States Sentencing Commission (see U.S.S.G. § 1B1.10). The Government reserves the right to oppose such claims for relief.

Plea agreement at § III (Doc. 17, criminal case).

The Seventh Circuit has held that "a waiver of a right to appeal contained within a guilty plea is enforceable," provided the waiver is knowing and voluntary. *United States v. Feichtinger*, 105 F.3d 1188, 1190 (7th Cir.), *cert. denied*, 117 S.Ct. 2467 (1997); *United States v. Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995). *See also United States v. Wenger*, 58 F.3d 280, 281 (7th Cir.), *cert. denied*, 116 S.Ct. 349 (1995). A waiver will not be enforced, however, if the district judge relied on impermissible facts in sentencing (for example, the defendant's race or gender) or if the judge sentenced the defendant in excess of the statutory maximum sentence for the offense committed.

Feichtinger, 105 F.3d at 1190.

Similarly, the Seventh Circuit has found that a waiver of Section 2255 relief in a plea agreement is enforceable, and should be treated no differently than the waiver of a direct appeal. *Jones v. United States*, 167 F.3d 1142, 1145 (7th Cir. 1999). Indeed, the Seventh Circuit has specifically stated that both statutory and constitutional rights can be waived in a plea agreement. *Id.* at 1144; *United States v. Woolley*, 123 F.3d 627, 631-32 (7th Cir. 1997); *Feichtinger*, 105 F.3d at 1190.

In this case, Petitioner states three grounds for relief: 1) that the Court impermissibly assessed a two-level enhancement under the Sentencing Guidelines for possession of a weapon because that enhancement was not contemplated in the plea agreement, nor were the facts underlying the enhancement determined by a jury, 2) that his counsel was ineffective in failing to object to the indictment which did not specify a drug quantity, and 3) because of his ineffective counsel, Petitioner was deprived of his right to appeal. None of these grounds fall under any of the exceptions to the waiver listed above. In addition, Petitioner does not argue that the Court relief on any impermissible facts in sentencing.

Specifically, as to Ground 1, the plea agreement clearly indicates that the Guideline range contemplated by the parties in the plea agreement is not binding upon the Court, and that the Court “is ultimately responsible for determining the applicable Guideline range and determining the sentence which will be imposed.” Plea agreement at § II, ¶ 3 (Doc. 17, criminal case). Furthermore, “the Court has the discretion to sentence the Defendant anywhere up to the statutory maximum sentence after consideration of the Sentencing Guidelines, and the factors set forth in 18 U.S.C. § 3553(a), including the nature and circumstances of the offense and the criminal history and

characteristics of the Defendant.” *Id.* Petitioner was sentenced well below the statutory maximum of 20 years. *See* 21 U.S.C. § 841(b)(1)(C). Consequently, there is no basis in the record for avoiding this waiver.

Because the waiver provisions of the plea agreement are enforceable, Petitioner has waived any right to bring this section 2255 motion. Accordingly, Petitioner’s motion pursuant to 28 U.S.C. § 2255 is **DENIED**, and this action is **DISMISSED** with prejudice.

IT IS SO ORDERED.

DATED: March 14, 2007

/s/ David RHerndon
DISTRICT JUDGE